

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1372

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

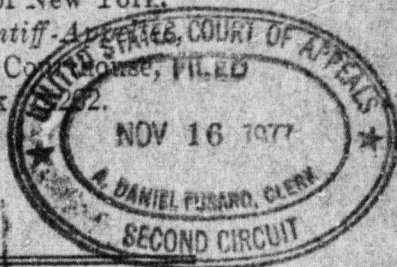
FMC CORPORATION,
Defendant-Appellant.

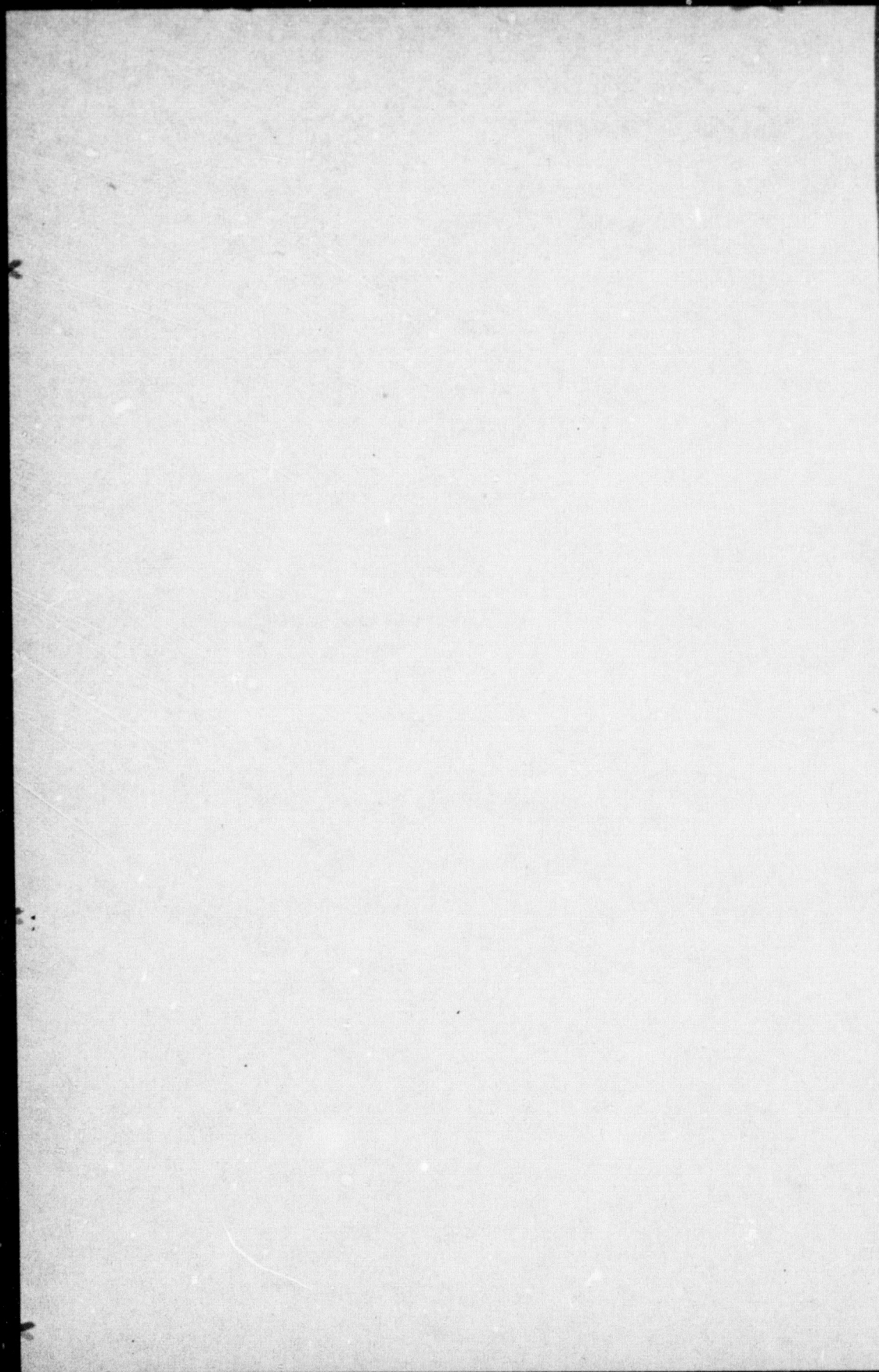
APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF NEW YORK.

BRIEF OF THE APPELLEE

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United States Court of Appeals

For the Second Circuit

Docket No. 77-1372

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

FMC CORPORATION,
Defendant-Appellant.

BRIEF OF THE APPELLEE

I. Issues for Review

Does the imposition of the penalty under the Migratory Bird Treaty Act set forth in Title 16, United States Code, Section 707(a) for killing migratory birds in violation of Title 16, United States Code, Section 703 require a finding that the killing of the migratory birds be intentional?

Was FMC Corporation entitled to a charge that accidental killing of migratory birds was a defense?

II. Statement of the Case

A. Procedural History

The United States of America adopts the statement of FMC Corporation set forth in its introduction at pages 1 and 2 of its brief.

B. Factual History

1. The Indictment

On July 30, 1975 a United States Grand Jury for the Western District of New York filed a 36 count indictment against the defendant, FMC Corporation, charging it with 36 counts of killing migratory birds whose deaths were discovered during the period from April 23, 1975 through June 25, 1975 (7-8). On July 1, 1977, following a jury trial, FMC Corporation was acquitted of Counts 1 and 2 with respect to migratory birds whose deaths were discovered on April 23, 1975; convicted on Counts 3 through 5 with respect to migratory birds whose deaths were discovered on April 25, 1975; acquitted on Count 6 with respect to migratory birds whose deaths were discovered on May 6, 1975; convicted on Counts 7 and 9 and acquitted on Count 8 with respect to migratory birds whose deaths were discovered on May 7, 1975; convicted with respect to Counts 10 through 13 with respect to migratory birds whose deaths were discovered on May 13, 1975 though reported in the indictment as May 9, 1975; acquitted on Counts 14 through 17 with respect to migratory birds whose deaths were discovered on May 15, 1975; acquitted on Counts 18 and 19 with respect to migratory birds whose deaths were discovered on May 19, 1975; convicted on Counts 20 through 22 with respect to migratory birds whose deaths were discovered on May 23, 1975; convicted on counts 23, 24, 26, 27 and 28 and acquitted on Count 25 with respect to migratory birds whose deaths were discovered on May 29, 1975; convicted on Count 29 and acquitted on Counts 30 and 31 with respect to migratory birds whose deaths were discovered on June 9, 1975 and acquitted on Counts 32 through 36 with respect to migratory birds whose deaths were discovered on June 25, 1975. Inasmuch as FMC is contending that it lacked the requisite intent and *mens rea* for com-

mission of the crimes charged in the indictment, events which occurred on the days of the discovery of bird deaths for which the defendant was acquitted are relevant and will be included in the statement of facts.

2. *The Cause of Death*

FMC Corporation maintained a ten acre pond at their Middleport, New York manufacturing plant (32, 185, 185, 184). This lagoon held approximately 12 million gallons of water and was impounded by grassy dikes (184, Government's Exhibit No. 3, 35). It contained an island and had a peninsula jutting into it (33). Open beach-like areas surrounding portions of the lagoon were attractive to shore birds; the size of the open water was attractive to waterfowl during migration and the brush and cattails provided a suitable habitat for a variety of song birds (274). This lagoon was used for holding processed waste water from the manufacture of dithiocarbamates and wash water from the production of carbofuran before discharge of those waters into the Jeddo Creek pursuant to a permit issued by the Environmental Protection Agency (176, 165, 373). During the time period covered by the indictment, washdown water from the production of carbofuran was pumped from a sump to the holding lagoon approximately once a day (158, 159). Carbofuran is a carbamate pesticide used to control root worms and other insects (148). It is a cholinesterase inhibitor which prevents nerves from functioning properly so as to result in muscle contraction, tremor, convulsions and respiratory failure leading to death (207, 256). It can kill all forms of animal life from protozoans to insects to cows (256). Washdown water from the carbofuran production area was treated in this sump with sodium hydroxide in order to cause the breakdown of the carbofuran before being pumped into the holding lagoon (151). The

system was effective only on carbofuran suspended in the water; carbofuran became concentrated in the sump in a solid form which could not be broken down and was pumped directly into the holding lagoon (153, 373). As a result, the concentration of carbofuran in the lagoon during May of 1975 varied from approximately 70 to approximately 90 parts per million (371, 372). As of May 29, 1975 it was estimated that the lagoon held approximately 2,500 lbs. of carbofuran (259). This concentration of carbofuran in the lagoon water was approximately 200 times greater than the LD 50 to kill a mallard duck (289). The LD 50 is that amount of poison which if given to 20 birds would cause 10 to die and 10 to survive (289). Commencing approximately April 11 and continuing through June 25, 1975, numerous dead migratory birds were discovered at the lagoon. Dr. Ward Stone, the New York State Wildlife Pathologist, after eliminating disease (268), parasites (268), dithiocarbomates (311), organophosphates (325, 326), arsenic (291), ammonia (291, 318) and trauma (325) as the cause of death; and after studying the gross pathology of the birds (265), the results of tissue analysis from the birds (265, 290), the results of chemical analysis of the water in the FMC lagoon (265, 290, 310), and after performing experiments with FMC water (285, 286, 292, 293, 295), and after visiting the holding lagoon at FMC (269), determined that the cause of death of the birds which FMC was convicted of killing was carbofuran (296). Throughout this period of time as will be more fully set forth in the following sections, FMC Corporation although it knew of the dangerous conditions at the lagoon, took no effective action to prevent the deaths of these birds.

The Initial Discovery, April 11-April 25, 1975

About April 11, 1975, Donald Towns, then the technical manager and carbofuran production manager of the plant observed five dead ducks in the wastewater holding lagoon (148, 163). On April 23, 1975 he requested Julius Antonucci, the head groundskeeper, to have his assistants remove the birds from the lagoon (175). Antonucci had Orin Duvall remove the birds (334). Duvall collected approximately 26 Canada Geese, and 8 or 9 ducks, placed them in heavy duty plastic bags and loaded the plastic bags on a garbage truck (142, 143, 144). Later that day Towns learned the extent of the bird kill (165).

The next day, an empty rowboat was anchored in the pond to scare away the birds and Towns reported the deaths to William Cole, the plant manager (165, 169, 175). On April 25, 1975, Pat Martin, a New York State Fish and Wildlife Technician, together with Senior Fish and Wildlife Technician Richard Credeman and Assistant Sanitary Engineer Paul Ferscht visited the FMC plant in response to complaints about wildlife mortality (121). This visit occurred during migration time for Canada Geese and Martin observed these birds feeding in the fields as close as a mile from the plant (122). At the holding lagoon Martin observed numerous dead birds too decomposed to collect (133) and collected three dead birds, a Hooded Merganser, Lesser Yellow Legs and Horned Lark.

On April 25, 1975 Cole discussed the possibilities of ammonia and zinc as being the cause of death of the birds with Paul Ferscht; however, neither he nor Ferscht knew the toxic limits of those chemicals for birds (211).

During this initial period a two week gap existed between discovery of the deaths and the anchoring of the rowboat.

Approximately 41 dead migratory birds were collected and a large number of other dead birds too decomposed for collection were left at the lagoon.

4. *The State Investigation—April 26, 1975 Through May 14, 1975*

On May 6, 1975, Orin Duvall collected another group of about 7 migratory ducks (145).

On May 7, 1975, Earl Harris, an Associate Analytical Chemist with the New York State Department of Environmental Conservation, visited FMC, together with Pat Martin and other employees of the Department of Environmental Conservation for the purpose of continuing the investigation into the dead birds at the FMC lagoon (90, 91, 92). In a conversation with William Cole, he obtained an updated list of the pesticides manufactured at the plant (Government Exhibit No. 12, Index No. 18) (93). Carbofuran was contained on that list and Harris learned that waste water from the manufacture of carbofuran entered the holding lagoon (114). In addition, during this conversation with Cole, zinc, ammonia carbonate and arsenic were discussed as being a possible cause of death (114, 211). Harris sampled the water from the lagoon and later analyzed it for, among other things, carbofuran (98, 99).

During an examination of the lagoon on May 7, 1975 Pat Martin and Earl Harris discovered and collected a Canada Goose, Least Sandpiper and Oldsquaw Duck (127, 128, 97).

On May 9, 1975, FMC Corporation put styrofoam squares with flags on them over the water of the lagoon (133, 186). These floats had the potentiality to attract birds (237, 238).

On May 13, 1975, Pat Martin again inspected the FMC lagoon and in addition to taking water samples he collected a

Ringbilled Gull, two Least Sandpipers, a Hooded Merganser and a Shortbilled Dowitcher (128, 129, 8).¹

FMC Corporation also sampled the lagoon water on May 13, 1975 and had that sample analyzed for the presence of carbofuran (199, 256). They learned that carbofuran was present about 3 to 5 days later (209).

During the period April 26 through May 13, 1975 about 15 dead migratory birds were collected from the holding lagoon. New York State and FMC Corporation took steps to determine the cause of death of the birds and FMC Corporation in a further effort to frighten birds away from the lagoon placed floats on the surface of the water, however, those floats could have acted to attract the birds.

5. *The joint federal and state investigation, May 15, 1975-June 25, 1975*

On May 15, 1975 and May 16, 1975 Fish and Wildlife Agent Leonard Lisenbee visited the FMC plant (26, 45). He collected four dead birds on the 15th: a Piedbilled Grebe, two Least Sandpipers and a Spotted Sandpiper (41). Pat Martin collected a Lesser Yellowlegs earlier in the day (131).

On the 16th of May, Agent Lisenbee and Manager Cole discussed measures FMC could take to alleviate the conditions leading to the death of the birds (66, 186). Lisenbee suggested the use of zon guns and cracker shells and suggested places where Cole could obtain the guns and the shells (67, 89, 186). In addition, he suggested the use of avalarms and netting over the lagoon (75, 78, 82, 87, 88, 217, 218). A zon gun is a propane canon used to scare birds (67). A cracker shell makes a loud noise 60 to 80 yards from the point

¹ The birds listed in the indictment as discovered on May 9, 1975 were testified to by Pat Martin as having been discovered on May 13, 1975.

of firing. It is used to scare birds from areas they will fly without the user actually being in the area (67).

On May 19, 1975, Lisenbee discovered two Least Sandpipers and one Semipalmated Plover (49, 9).

On May 21, 1975 the zon guns were installed. Apparently they were not shut off after dark for that night the sheriff appeared at the plant in response to complaints about the noise (169, 187). After some experimentation the zon guns were placed below the dike on one side of the pond at their lowest volume with five minute intervals of firing (188). As a result they were not effective in scaring the birds away (67, 68).

On May 23, 1975, Agent Lisenbee collected four dead birds, one Green Heron, two Semipalmated Plovers and one Spotted Sandpiper (52, 9).

On May 29, 1975, Agent Lisenbee and Dr. Stone, a New York State Wildlife Pathologist, visited the FMC holding lagoon (55, 259). During that trip Dr. Stone advised William Cole that he suspected carbofuran caused the deaths of the birds (209, 210, 336). In addition, Stone discussed the impact of the zon guns on the birds with Cole and advised Cole that the styrofoam floats could actually act as a decoy (278, 279). He also recommended to Cole that FMC find a solution which would ultimately make the lagoon safe for birds such as getting the toxin out and also covering the lagoon so that the birds could not get in (281). Analysis of the lagoon water on May 29, 1975 indicated the presence of carbofuran in the concentration of approximately 73.6 to 76.6 parts per million (371).

On June 9, 1977 Lisenbee again visited the plant and this time collected seven dead migratory birds, two Least Sand-

pipers, four Semipalmated Sandpipers, and one Spotted Sandpiper (58, 59).

On June 13, 1975 FMC instituted a guard service around the lagoon with guards contracted from Globe Security (190, 191). The guards were armed with a shotgun used to fire cracker shells which were previously suggested by Agent Lisenbee (62, 63). The guard service was ineffective in scaring away birds during the month of June (191).

On June 25, 1975 when Lisenbee again visited the plant, the guard on duty at that time was sleeping (63). Lisenbee collected nine dead migratory birds that day, five Least Sandpipers, one Swamp Sparrow, one Pintailed Duck, one Horned Lark and one Fringillid (63, 9).

By the end of June FMC had analyzed the sump which pumped waste washwater from the FMC production area to the lagoon and discovered that solid carbofuran was being pumped directly from the sump into the holding lagoon (153).

At the outset of this period of time both the federal wildlife agent and the New York State pathologist advised FMC concerning methods which could be taken to alleviate the attractiveness of the lagoon to migratory birds and scare them away. FMC employed two of these methods, the zon guns and the use of guards. The proximity of the lagoon to a residential area precluded the effective use of the zon guns. Lack of supervision of the guards reduced their effectiveness. During this period a large number of dead migratory birds were collected at the holding lagoon on seven separate occasions. By the end of this period FMC had learned that carbofuran was the probable cause of the birds' death and had discovered that solid chunks of carbofuran were being pumped directly into the holding lagoon.

6. *Post Indictment Events*

It was not until after the time period covered in the indictment that FMC Corporation took effective measures to alleviate the conditions causing the deaths of the migratory birds. During July 1975 the guard service became effective (191), four avalarms were installed (68, 81), sodium hydroxide was added to the lagoon in an effort to breakdown the carbofuran (196, 198, 223) and netting was installed over the lagoon (68, 219). Thereafter, a filter was installed to prevent solid carbofuran from being deposited into the lagoon (216) and by October, 1975 a carbon treatment system for the carbofuran washwater was instituted (217). By the time the indictment was tried, the lagoon had been completely graded over (74).

7. *Summarization*

The evidence at the trial indicated that FMC Corporation maintained a wastewater holding lagoon at its Middleport factory which was highly attractive to migratory birds, that this wastewater holding lagoon contained lethal levels of carbofuran which resulted in the deaths of the birds. Initially, FMC took no action to alleviate the conditions. After the first visit by the New York State Department of Environmental Conservation officers, it set out styrofoam floats. These floats had the capability of attracting migratory birds. In mid-May, the Federal Fish and Wildlife agent suggested four different ways for preventing birds from visiting the lagoon. The New York State Wildlife pathologist also discussed methods of preventing birds from visiting the lagoon. The defendant's efforts to implement these suggestions were ineffective and the bird deaths continued until the end of June, 1975. Finally, during July, 1975, after the period of

time covered in the indictment, the defendant succeeded in implementing measures both to prevent birds from visiting the lagoon and to detoxify the waters of the lagoon. Under the statute the Court properly refused to charge the jury that intent was an element of the offense. Under these facts the Court properly refused to grant the defendant's request for a charge related to accident.

III. ARGUMENT

A. The imposition of the penalty set forth in Title 16, United States Code, Section 707(a) for killing migratory birds in violation of Title 16, United States Code, Section 703 which makes it unlawful by any means or by any manner to kill migratory birds does not require a finding of intentional killing.

1. Summary

The Courts have long recognized classes of offenses which require no criminal intent for the imposition of criminal sanctions.

In *Morrisette v. United States*, 342 U.S. 246 (1952), the Supreme Court stated:

"many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty . . . such offenses may be regarded as offenses against the state's authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted. In this respect whatever the intent of the violator, the injury is the same, and the consequences are injurious or not according to fortuity.

Hence legislation applicable to such offenses, as a matter of policy, does not specify intent as a necessary element." *Morissette* at 255 and 256.

The Court recognized the fact that penalties were relatively small and a conviction did not damage the defendant's reputation. *Morissette* at 256.

In *United States v. Freed*, 401 U.S. 601 (1971), the Supreme Court reviewed the broad spectrum of criminal statutes requiring no specific intent to sustain a conviction. It recognized that the *mens rea* required to support a conviction for statutory offenses ranges from an awareness that the proscribed activity was "not an innocent act," such as the possession of hand grenades in *Freed*, to situations where consciousness of wrongdoing was absent, as in *United States v. Dotterweich*, 320 U.S. 277 (1943).

The requirement of "vicious will" or *mens rea* depended upon legislative intent. *Freed* at 607.

The legislative intent of Congress in enacting the Migratory Bird Treaty Act was to strictly prohibit the killing of migratory birds regardless of the intent or *mens rea* of the individual. Judge Curtin properly charged the jury that:

"The language found in the treaties and history of the Act itself indicates that the Government's intention was to place a high social value on the protection of migratory birds."

"The Government does not have to prove that the defendant intended to kill the birds. You may convict the corporation even if you find that the killing was accidental or unintentional provided that you find that FMC Corporation did kill the birds as charged in the indictment." (359, 360, 361).

2. The Act Dispenses With the Requirement of Intent

The statute prohibits all unauthorized killing of migratory birds without limitation:

" . . . it shall be unlawful at any time, by any means or in any manner, to . . . kill . . . any migratory bird . . . included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds concluded August 16, 1916 (39 Stat. 1702), the United States and the United Mexican States for the protection of migratory birds and game mammals concluded February 7, 1936, and the United States and the Government of Japan for the protection of migratory birds and birds in danger of extinction, and their environment concluded March 4, 1972". 16 U. S. Code, Section 703.

The act itself by its title: "An Act to Give Effect to the Conventions Between the United States and other Nations for the Protection of Migratory Birds, Birds in Danger of Extinction, Game Mammals, and their Environment", not only recognizes the broad purpose of the act but also the international agreements on which it is based. "By deleting the reference to specific Conventions in the title of the Act, the necessity of amending the title each time a similar Convention is entered into in the future with other countries will be eliminated." House Report 93-936, 93rd Congress, Sec. Session, March 26, 1974 at page 5, Senate Report 93-851, 2 1974 *U. S. Code Congressional and Administrative News*, 3250 at page 3253.

In a separate section Congress spelled out the penalties for violation of the statute:

(a) Except as otherwise provided in this section, any person, association, partnership or corporation who shall violate any provisions of said conventions or of sections

703 to 711 of this title, or who shall violate or fail to comply with any regulation made pursuant to said sections shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$500 or be imprisoned not more than six months, or both.

(b) Whoever, in violation of sections 703 to 711 of this title, shall—

(1) take by any manner whatsoever any migratory bird with intent to sell, offer to sell, barter or offer to barter such bird, or

(2) sell, offer for sale, barter or offer to barter, any migratory bird shall be guilty of a felony and shall be fined not more than \$2,000 or imprisoned not more than two years, or both. T. 16, U.S.C., § 707.

This separation of the penalty provision from the prohibition indicates that Congress intended to create sanctions for violation of the conventions as well as Section 703 and that Section 703 was enacted to provide protection for birds beyond the scope of the conventions. The 1960 amendment created the two year felony for offenses under the act requiring a specific intent.

The purpose of the 1960 legislation was to penalize market hunters:

"The basic need for this legislation is the necessity to better protect our migratory game birds.

* * *

This bill would authorize more severe penalties for these market hunters and would provide for forfeiture of guns and equipment used by such persons if they were found guilty. Fines of not more than \$2,000 and prison sentences of not more than 2 years, or both, would be authorized by the legislation." Senate Report No. 1779, 2 1960 U. S. Code, *Congressional and Administrative News*, 3459.

See also *Increased Penalties for Violations of Migratory Bird Treaty Act*, Hearings before the House of Representatives of Committees of Fisheries and Wildlife Conservation of the Committee on Merchant Marine and Fisheries, May 3, 1960. This change in penalties in no way limits the broad protection provided migratory birds under Section 703 of the Migratory Bird Treaty Act. The addition of the element of intent in the imposition of the penalty under T. 16, U.S.C., § 707(b) was recognition by Congress that by imposing a harsh penalty in an aggravated situation, it was going beyond the usual light penalties mentioned in *Morissette* and thus an element of consciousness or *mens rea* not needed in the imposition of the penalty under subsection (a) was required.

The defendant argues that the lack of intent in the statute renders it unclear requiring strict construction against the United States including the element of intent. This argument was rejected by the Court in *Morissette* which recognized that public welfare statutes frequently deliberately omit intent as an element. ". . . Courts have turned to construing statutes and regulations which make no mention of intent as dispensing with it and holding that the guilty act alone makes out the crime." *Morissette* at 256. This circuit has also rejected that argument in interpreting 18 U.S.C., Section 922(a)(1) dealing with firearms without a license:

"There is no constitutional requirement that scienter be established as an element of the crime nor will Congress be presumed from silence to have intended to make it so when the purpose of the statute is to regulate objects or activities which in and of themselves are dangerous and harmful." *United States v. Ruisi*, 460 F.2d 153 (Second Circuit, 1972) cert denied 409 U.S. 914 (1972).

While this factual situation may be unique for judicial interpretation of the migratory bird treaty act the issue of intent under the act has been considered many times previously by the Courts.

The Courts which have examined the issue have concluded that intent is not an element necessary to establish a violation of the act. *United States v. Schultze*, 28 F.Supp. 234 (W.D.Ky. 1939); *Rogers v. United States*, 367 F.2d 998 (8th Cir. 1966) cert. denied 386 U.S. 943 (1967); *United States v. Jarman*, 491 F.2d 764 (4th Cir. 1973); *United States v. Ireland*, 493 F.2d 1208 (4th Cir. 1973); *United States v. Bryson*, 414 F.Supp. 1068 (D.Del. 1976); *United States v. Tarmon*, 227 F.Supp. 480 (D.Md. 1964). See also, *United States v. Wood*, 437 F.2d 91 (9th Cir. 1971). In *Schultze* the court convicted the defendants who were accused of violating the statute and the regulations prohibiting the taking of mourning doves by means of wheat used to lure the birds into the hunting vicinity. The government offered no evidence with respect to the knowledge of the defendants of the existence of the bait. The court rejected the argument of the defendants that since they had not baited the field and did not know that the field was baited at the time they hunted, they lacked the requisite knowledge and scienter essential to constitute an element of the offense. This argument is similar to the one raised by FMC. Just as the act of hunting in *Schultze* was legal, so is FMC's manufacture of pesticides. Just as the hunters argued they had no knowledge of the existence of the baited field, so FMC argues it had no knowledge that its actions exposed the birds to carbofuran. The court recognized that statutory crimes could be created where criminal intent was not an essential element. In arriving at its decision, the Court analyzed the purpose of the statute and the penalty imposed. The court examined the

treaty between the United States and Great Britain and noted the purpose of establishing protection for migratory birds. It concluded:

"In the case of *Shevlin-Carpenter Company v. State of Minnesota*, 218 U.S. 57, 30 S.Ct. 663, 54 L.Ed. 930, the Supreme Court held that the Legislature of a State could pronounce an act to be a crime although scienter was not present, in that public policy required in some cases that certain acts should be done at the peril of the party committing them, and in such cases the defendant would not be heard to plead in defense good faith or ignorance." *United States v. Schultze*, 28 F.Supp. 234, at 235.

The court did not consider the imposition of a \$500 fine or imprisonment for not more than six months or both, a harsh penalty. It recognized that:

"In view of the broad wording of the act, and the evident purpose behind the treaty and the act, this Court is of the opinion that it was not the intention of Congress to require any guilty knowledge or intent to complete the commission of the offense, and that accordingly scienter is not necessary. The beneficial purpose of the treaty and the act would be largely nullified if it was necessary on the part of the government to prove the existence of scienter on the part of the defendants accused of violating the provisions of the act. This construction does not carry with it any severe or harsh penalty on the part of innocent offenders." *Schultze*, at 236.

FMC is in a much weaker position than the defendants in *Schultze*. It learned that birds were dying at its lagoon two weeks before the period covered in the indictment (163). Simultaneous with investigation of the criminal offense, the Fish and Wildlife Agent consulted with FMC on measures which could be used to prevent bird deaths (66, 67, 75, 217, 218). New York State and FMC exchanged technical data

relating to the contents of the lagoon (209, 210). Nevertheless, the defendant chose to ignore the fact that its floats did not prevent bird deaths, that it could not use zon guns to scare birds away and that its guards were not doing the job. FMC had knowledge of the condition which the statute sought to prevent. Its failure to take effective measures to prevent the deaths during the period covered in the indictment subjects it to the penalties of T. 16, U.S.C., § 707(a).

3. The Conventions and the Migratory Bird Treaty Act were Entered into and Enacted to Protect Birds and Establish them as a Natural Resource.

FMC contends that the conventions and the statute were designed to protect migratory birds from slaughter at the hands of the hunter and since hunting is purposeful activity, strict criminal liability is inapplicable.

There can be no doubt that hunting was and remains one of the main dangers to migratory game birds. An examination of the conventions and the legislative history of the Migratory Bird Treaty Act, however, clearly indicates that Congress went beyond the purpose of controlling hunting pressures on a few species of migratory birds to establish protection for all birds as a natural resource.

The preamble of the Migratory Bird Treaty between the United States and Great Britain concluded August 16, 1916 clearly indicates that the parties contemplated more than protection of migratory birds from hunters:

Whereas, Many species of birds in the course of their annual migrations traverse certain parts of the United States and the Dominion of Canada; and

Whereas, Many of these species are of great value as a source of food or in destroying insects which are in-

jurious to forest and forage plants on the public domain, as well as to agricultural crops, in both the United States and Canada, but are nevertheless in danger of extermination through lack of adequate protection during nesting season or while on their way to and from their breeding grounds;

The United States of America and His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India, being desirous of saving from indiscriminate slaughter and of insuring the preservation of such migratory birds as are either useful to man or are harmless, have resolved to adopt some uniform system of protection which shall effectively accomplish such objects . . . 39 Stat. 1702 (1916).

The countries recognized birds not only as a source of food, insect control and agricultural aid, but also as being aesthetically valuable. Thus, under Article I three categories of migratory birds were recognized, "Migratory Game Birds", "Migratory Insectivorous Birds" and "Other Migratory NonGame Birds". Article II established the hunting season for migratory game birds and barred the hunting of migratory insectivorous birds and, with the exception of Indians and Eskimos, the hunting of other migratory nongame birds. Articles III and IV established protection measures for specified endangered migratory game birds. Article VI prohibited the interstate shipment of migratory birds or their eggs. The treaty provided less protection for migratory game birds than the other birds but left hunting regulations to be decided by the individual countries. The recognition of and extension of protection to the insectivorous birds and other migratory nongame birds is evidence of the government's intent to preserve and protect migratory birds as a natural resource regardless of their

known value. The Congressional debates (to be summarized later) indicate that the third category, "Other Migratory Nongame Birds" is a recognition of and extension of protection to migratory birds based on their aesthetic value.

The recognition of birds as a natural resource continues in the Mexican Treaty. The preamble states:

Whereas it is right and proper to protect the said migratory birds, whatever may be their origin, in the United States of America and the United Mexican States, in order that the species may not be exterminated;

Whereas, for this purpose it is necessary to employ adequate measures which will permit a rational utilization of migratory birds for the purposes of sport as well as for food, commerce and industry. 50 Stat. 1311 (1936).

That purpose was embodied in Article I of the treaty. Article II provided the specific methods of protection:

The high contracting parties agree to establish laws, regulations and provisions to satisfy the need set forth in the preceding Article, including:

(A)—The establishment of close seasons, which will prohibit in certain periods of the year the taking of migratory birds, their nests or eggs, as well as their transportation or sale, alive or dead, their products or parts, except when proceeding, with appropriate authorization, from private game farms or when used for scientific purposes, for propagation or for museums.

(B)—The establishment of refuge zones in which the taking of such birds will be prohibited.

(C)—The limitation of their hunting to four months in each year, as a maximum, under permits issued by the respective authorities in each case.

(D)—The establishment of a close season for wild ducks from the tenth of March to the first of September.

(E)—The prohibition of the killing of migratory insectivorous birds, except when they become injurious to agriculture and constitute plagues, as well as when they come from reserves or game farms: provided however that such birds may be captured alive and used in conformity with the laws of each contracting county.

(F)—The prohibition of hunting from aircraft. 50 STAT. 1311 at 1312.

The terms of relief cited in subparagraphs A, C, D and F of Article II of the treaty are limitations on hunting as noted by counsel for the defendant in his brief at pages 24 and 25. These subparagraphs are necessary to define the limited form of protection afforded migratory game birds as opposed to the almost complete protection afforded all other birds. Subparagraphs B and E however continue the distinction between game birds and insectivorous birds established by the treaty with Great Britain and prohibit the killing of all insectivorous birds except when they become injurious to agriculture and other specified exceptions. The use of the word "killing" as opposed to "hunting" demonstrates the intent to give protection to birds from all forms of death other than natural disaster. Article IV established a category entitled "migratory game birds" and a separate category for "migratory non-game birds" listing the families of birds protected under each category. It also provided for future amendment of the convention to add additional species. The category "Migratory Game Birds" in the Mexican convention is the same as in the convention with Great Britain and includes waterfowl, cranes, rails, native pigeons and all the shorebirds except the oystercatchers, which were later included in the treaty under the March 10, 1972 additions of protected families. By an agreement of March 10, 1972, the governments amended the convention to add all the birds included in the category "other migratory birds" in the treaty

with Great Britain and every other family of native North American birds (the only birds not protected by the treaties and the Migratory Bird Treaty Act are the pigeon, starling, house sparrow and monk parakeet) TIAS 7302; 23 U.S.T. 260. The inclusion of these additional species six days after the execution of the treaty with Japan without assigning them to a specific category was further recognition by the government of the value of all birds and a decision to extend protection to them as a natural resource.

The unexpressed recognition of the aesthetic value of birds implied from the third category in the convention between the United States and Great Britain was expressly recognized in the convention between the United States and Japan:

The Government of the United States of America and the Government of Japan,

Considering that birds constitute a natural resource of great value for recreational, *aesthetic*, scientific and economic purposes and that this value can be increased with proper management,

Considering that many species of birds migrate between areas of the United States of America and Japan, where such birds live temporarily,

Considering that island environments are particularly susceptible to disturbance, that many species of birds of the Pacific Islands have been exterminated, and that some other species of birds are in danger of extinction, and

Desiring to cooperate in taking measures for the management, protection, and prevention of the extinction of certain birds,

Therefore have agreed as follows:
TIAS 7990, 25 U.S.T. 3331 (March 4, 1972).

Under Article III of the treaty the taking of migratory birds or their eggs was prohibited together with the sale, purchase or exchange of the birds or their eggs if taken illegally with a few exceptions including an exception for hunting. In addition to providing protection for birds, the treaty contemplated the establishment of sanctuaries:

3. Each Contracting Party shall endeavor to establish sanctuaries and other facilities for the protection of management of migratory birds. TIAS 7990.

Similarly, under Article V of the Treaty, the governments agreed to encourage the establishment of joint research programs on and conservation of migratory birds and birds in danger of extinction. In Article VI of the Treaty, the governments agreed to endeavor to take appropriate measures to preserve and enhance the environment of protected birds and birds in danger of extinction:

Each Contracting Party shall endeavor to take appropriate measures to preserve and enhance the environment of birds protected under Articles III and IV. In particular, it shall:

(a) Seek means to prevent damage to such birds and their environment, including especially, damage resulting from pollution of the seas;

(b) Endeavor to take such measures as may be necessary to control the importation of live animals and plants which it determines to be hazardous to the preservation of such birds; and

(c) Endeavor to take such measures as may be necessary to control the introduction of live animals and plants which could disturb the ecological balance of unique island environments. TIAS 7990

The obligations of this treaty envision more than mere protection of birds from hunters. It obligates the parties to protect and manage environment so as to produce optimal conditions for the survival of migratory birds and conduct joint research programs to increase man's knowledge of birds and his ability to propitiously manage their environment. The treaty recognizes that birds can be endangered by disturbing the environment in which they live and requires laws which protect birds from the harmful results of a change in environment. The broad language of Title 16, U.S.C., § 703 under which FMC is charged, just as the Endangered Species Act cited by FMC at page 26 of its brief are in accord with the broad treaty objectives and evidence Congress's intention to grant birds extended protection as a natural resource beyond the protection afforded from hunting.

Even before the Migratory Bird Treaty Act of 1918 the Lacey Act embraced the concept of the conservation of migratory birds as a natural resource: "the duties and powers of the Department of Agriculture are hereby enlarged so as to include the preservation, distribution, introduction and restoration of game birds and other wild birds . . ." 31 Stat. 187, May 25, 1900. That language exists in the statute today, Title 16, U. S. Code, Section 701. The Lacey Act prohibited interstate transportation of dead birds and their parts where the birds were taken in contravention of state laws. It is currently codified at Title 18, U. S. Code, Section 43. The Lacey Act was the first Federal Conservation Act recognizing the value of birds and was enacted in response to the slaughter of American birds for the millinery business. See Helen Ossa, *They Saved Our Birds*, pp. 1-44 (Hippocrene Books 1973).

On March 3, 1913 the predecessor statute to the Migratory Bird Treaty Act was passed as an amendment to the

Department of Agricultural Appropriation Act, 37 Stat. 847. That statute envisioned migratory birds as property of the United States of America and prohibited their killing except as provided by regulations established by the Department of Agriculture. Enforcement of the statute led to decisions holding the statute unconstitutional on the grounds that the subject matter was exclusively within the powers reserved to the states under the Tenth Amendment. The legal atmosphere at the time indicated that migratory bird protection was a proper subject of a convention and a statute enacted to enforce a convention was within the treaty powers of the Federal Government. See Charles A. Lofgren, "Missouri v. Holland in Historical Perspective", *The Supreme Court Review* 1975 (The University of Chicago Press, Chicago, Illinois 1976).

Consideration of the Migratory Bird Treaty Act came before Congress during the first World War. Its proponents asserted it as a war measure related to the conservation of agricultural and forest products:

"Mr. Fess . . . I admit that while it is a sort of habit with us today to call everything a war measure, and it is to be expected that such a claim would be made, I think without doubt this is a war measure. I believe that the conservation of the bird life is a real conservation of food, and while some persons might think that is a little far fetched I have a statement here of the annual loss to the United States caused by insects on farms, which is backed by the Bureau of Entomology, and this statement is to me quite startling . . .

Now, Mr. Speaker, the House has not hesitated on various appropriation bills to appropriate large sums to eliminate insects and other pests that destroy food products, whether it be in the field or the orchard, but if these figures which are given to us by the Bureau of Entomology are at all accurate there is something in the

argument that this is a war measure for the preservation of our food products, as the food problem is one of the greatest military concerns in our program to end this war with victory." 56 Cong. Rec. 7357 (1918)

Representative Stedman of North Carolina, the proponent of the bill indicated the many purposes of the legislation and the consideration behind it.

"Mr. Stedman: Mr. Chairman, the purpose of this bill is to give effect to the convention between the United States and Great Britain for the protection of migratory birds. It was concluded at Washington August 16, 1916. Insectivorous migratory birds as well as migratory game birds are embraced in the terms of the treaty. The protection of the insectivorous migratory birds is essential to the preservation of our cotton, grain, and timber crops, whilst the migratory game birds contribute materially to our food supply. The bill may well be considered a measure of importance as affecting the successful prosecution of the war in which we are now engaged . . .

"You will realize the very great importance of this bill as a conservation measure if you will consider the enormous extent of the destruction of our crops by insects. Few even of the best informed know the vast extent of the damage. . . .

Many of you will recollect—it has not been so many years ago—when immense flocks of wild pigeons darkened the skies in their flight, when the branches of trees upon which they lighted broke beneath their weight.

Where are they now? You will look for their coming in vain. Not one can be found within all the borders of this vast land of ours. Whither have they flown? The answer will be found in the avarice and brutality of man in their slaughter for sale and for sport, unrestricted by regulations of any kind.

Unless legislation is enacted for the protection of bird life with efficient regulations rigidly enforced, the birds

of this country, so useful to all in their conservation of food by the destruction of insects and a source of happiness to thousands, aside from their utility, will join the wild pigeons in their last flight . . .

Let the song bird live to herald to the world its happy and joyous anthem proclaiming the goodness of God to all its creatures . . .

Civilization, ever advancing along the world's pathway, pleads for humanity, for the birds, so helpless and yet so useful.

The farmers throughout our entire land, through their organizations, both National and State, with no dissenting voice express their approval.

Five millions of sportsmen entertain the same sentiment; very few, if any, to the contrary.

The boys and girls who journey from their country homes to the village schoolhouse, who halt their footsteps and linger on their way as the sweet message of the songbird comes to them from the fields and the hedges, look to you with appealing eyes which seem to ask, "Why do you so long delay?" 56 Cong. Rec. 7360-7362 (1918)

Clearly Representative Stedman in these remarks recognized the urgent need to protect birds in order to save them from extinction, assist agricultural productions and maintain them for their intrinsic value.

Representative Linthicum of Maryland in addition to noting the economic need for bird conservation also noted their intrinsic value.

"We have enacted legislation for the protection of our forests, the conservation of our coal supply, and the preservation of many of the great resources of the country. Certainly it is high time for bird protection, not only

as an enjoyment to all the people but a benefit which can not be delivered in any other possible manner." 56 Cong. Rec. 7369 (1918).

Congress also recognized that this legislation was not necessary simply to protect birds from hunters. Most of the species of birds protected by the legislation in fact were not the object of hunters. Representative Green of Iowa speaking against the bill remarked:

"Everywhere there is already full provision made for the protection of song and insectivorous birds. What are the enemies of insectivorous birds? These hunters gentlemen have been talking about? Who hunts insectivorous birds? Not anybody in my State or elsewhere hunts insectivorous birds." 56 Cong. Rec. 7453 (1918).

One of the concerns of Representative Green and other opponents of the Act was the fact that a \$500 fine and imprisonment for 6 months could be imposed on an individual for a violation of the Act regardless of his intent. The following dialogue occurred during debate on an amendment to change the penalty so as to impose a \$100 fine and 2 months imprisonment:

Mr. Cooper of Wisconsin. Does the gentleman think that if his amendment were enacted in the law the man who kills the birds which he specifies could be justly subjected to such a penalty as \$100 and two months?

Mr. Johnson of Washington. I do not quite understand what the gentleman means.

Mr. Cooper of Wisconsin. Does the gentleman think that the man *who without guilty intent* killed a scoter should be fined \$100 and sent up for two months?

Mr. Johnson of Washington. I say that the extreme penalty is too severe.

56 Cong. Rec. 7457 (1919) (emphasis added).

Although it obviously disturbed some members of the house, it was apparent to all that the penalties for violations of the act could be imposed regardless of the intent of the violator.

In 1936 when Congress was considering the amendments to the Migratory Bird Treaty Act on account of the convention with United and Mexican states it included in the record a letter from Secretary of State Cordell Hull to President Franklin D. Roosevelt which summarized the purpose of the conventions.

"A vast stride toward the restoration and protection, indeed in some cases the rescue from extirpation, of our migratory game, and various groups of our insectivorous and other birds, was taken by the conclusion of the convention of August 16, 1916, with Great Britain, for the protection of birds migrating between Canada and the United States. But as numbers of species of these birds, both game and nongame, extend their migrations and winter dispersals to Mexico and beyond, it has been manifest that to insure their more effective conservation, as well as the conservation of other groups of birds migrating between Mexico and the United States, cooperation with the United Mexican States is not only desirable but also quite imperative."

"With Canada, the United States, and Mexico cooperating in the conservation of migratory species of birds it confidently may be expected that the *perpetuity of these birds is assured against all contingencies save the untoward operations of nature.*"

80 Cong. Rec. 6438 (1936) (emphasis added).

The legislative history of the amendment to the act in 1974 clearly indicates that Congress was aware of and supported the protection extended to migratory birds and their environment by the Japanese convention. In his letter of trans-

mittal of the convention to the Senate, dated August 18, 1972, President Nixon set forth the principles of the convention:

This Convention which marks the culmination of several years of extensive study and consultations between experts of both countries is designed to provide for the protection of species of birds which are common to both countries or which migrate between them. Recognizing that island environments are particularly susceptible to disturbance, the Convention provides that each country will develop programs to preserve and enhance the environment of the birds which are protected under the Convention. 2 1974 *U. S. Code Congressional and Administrative News* 3255.

The prohibitions contained in Title 16, U. S. Code, Section 703 were reviewed at the time the legislation was considered and amended not only to insert the name of the Japanese convention into the Act but also to insert the prohibition against taking, selling, purchasing, exchanging and shipping products of birds, their nests or eggs. Senate Report No. 93-851, 2 1974 *U. S. Congressional Code and Administrative News*, page 3252. The debate in the House of Representatives concerning the 1974 Amendment is notable for its absence of a reference to hunting and the lack of controversy with which the amendments were treated. Representative John D. Dingell of Michigan, one of the sponsors of the bill and chairman of the Fisheries and Wildlife Conservation and the Environment Subcommittee of the House Merchant Marine and Fisheries Committee pointed out:

One of the highlights of this convention is that each country would be required to preserve and enhance the environment of birds protected under the convention. In particular, each country would be required to seek means to prevent damage to such birds and their environment, including damage from pollution of the seas. 120 *Cong. Rec.* 9304 (April 2, 1974).

Representative James R. Grover, Jr. of New York, also a member of the Merchant Marine and Fisheries Committee of the House of Representatives and one of the bills's co-sponsors stated:

In essence, that act makes the taking, killing, possessing or transporting of migratory birds unlawful unless and except as provided by regulations promulgated by the Secretary of the Interior and approved by the President. Attempts at taking, killing, or possessing also are made unlawful. The act applies to birds or any part, nest or egg of any such bird, or any product thereof. In 1936, the act was amended to include a convention between the United States and Mexico covering game mammals in addition to migratory birds. H.R. 10942 will now amend the Migratory Bird Treaty Act to conform its provisions to the provisions of a convention between the United States and Japan for the protection of migratory birds and birds in danger of extinction, and their environment. 120 *Cong. Rec.* 9304 (April 2, 1974).

Clearly the Migratory Bird Treaty Act is designed to provide protection for migratory birds from all harm caused by man whether or not specifically directed at birds or caused by hunters. In *Cerritos Gun Club v. Hall*, 96 F.2d 620 (9th Cir. 1938) the Cerritos Gun Club attempted to argue that the enactment by the Secretary of regulations controlling baiting was beyond the scope of the Migratory Bird Treaty and the Migratory Bird Treaty Act. Prior to that portion of the decision concerning the asserted argument the court ruled that the exercise of the hunting regulations was within the scope of Congress under the commerce clause of the Constitution and recognized the need for protection:

"Certainly, when we consider the history of the myriads of carrier pigeons and the countless buffalo traveling north

and south between the States and Canada, and the disappearance of the former, and the *breeding in enclosed captivity* of the latter, it is no 'fanciful conjecture' . . . that the Congress may rationally entertain the anticipation of a similar fate to migratory waterfowl." *Cerritos* at 625.

The court reached the conclusion that the Migratory Bird Treaty Act could be construed as intending to cover purposes other than those specifically embodied in the convention. It concluded that the language of the statute under which FMC was convicted effected broader purposes of saving migratory birds from indiscriminate slaughter and insuring their preservation:

" . . . the provision of section 2 of the act, as amended, 16 U.S.C.A. Section 703, distinguishing between 'time' and 'manner' demonstrates what 'other purposes' Congress has in mind. That provision is: 'Unless and except as permitted by regulations made as hereinafter provided, it shall be unlawful to hunt, take, capture, kill, *** at any *time* or in any *manner*, any migratory bird included in the terms of this convention.'

The broader 'purposes' of the makers of the convention, as distinguished from its narrowing 'provisions', are expressed in its preamble as: 'The saving from indiscriminate slaughter' and 'insuring the preservation of such migratory birds as are useful to man or harmless.' " *Cerritos* at 627.

The Conventions and the statute go beyond protection of migratory birds from hunters. By providing protection to insectivorous birds and "harmless" birds Congress established birds as a natural resource. *United States v. Olson*, 41 F. Supp. 433 (W.D. Ky., 1941) and *Allen v. Merovka*, 382 F. 2d 589 (10th Cir., 1967) cited by FMC at page 25 of its brief are concerned with specific regulations under 16 U.S.C. Section 704 which delegates to the Secretary of the Interior the power to

establish hunting regulations. They do not attempt to evaluate the broad congressional purposes of the act. The legislative history of the Migratory Bird Treaty Act, the language of the Act and the international conventions clearly indicate that 16 U.S.C. Section 703 prohibiting the killing of migratory birds is a public welfare offense from which the element of intent was deliberately omitted. Judge Curtin correctly charged the jury that FMC's intent was not an element of the offense.

B. The Court properly refused the charge of accident.

FMC requested the Court to charge that if the jury found that the birds died as a result of an accident it should acquit the defendant. It argues that since carbofuran was discharged into the lagoon inadvertently and it did not know the cause of death was carbofuran, the deaths were accidental and it had no *mens rea*.

This argument attempts to divert the attention of the Court from the fact of the killing of birds, which is prohibited by the statute and was the subject of the trial, to the production of carbofuran. It also is an attempt to introduce intent into a public welfare statute through the requirement of knowledge which if possessed would cause FMC to have specific intent. As the Court recognized in *Freed* the consciousness of wrongdoing required by these offenses runs from awareness as in *Morissette* to complete absence as in *Dotterweich*. See *Freed supra* at 609. The migratory bird treaty act as indicated from the previous argument is close to *Dotterweich* with respect to the requirement of intent and *mens rea*. Nevertheless it is clear from the facts that FMC Corporation had knowledge of the bird deaths which led to the indictment and in spite of that fact took no effective measures to halt the deaths. The argument of accidental death is inappropriate.

FMC first learned birds were dying at its lagoon about 2 weeks before the start of the New York State investigation (163). Two days before the investigation it learned the extent of the bird kill (165). Even before it was discovered that carbofuran was the toxic substance in the lagoon causing the death of the birds the federal fish and wildlife agent discussed ways to prevent birds from obtaining access to the lagoon (66, 186). In spite of this knowledge FMC allowed two months of continuous bird deaths to continue before it took effective action to halt the deaths. For one of those two months FMC had knowledge that the substance causing the bird deaths was carbofuran (209). During all of this period of time it could have initiated measures to avoid bird deaths by preventing them from obtaining access to the lagoon. Thus *State v. American Agr. Chemical Company*, 110 S.E. 800 (S. Ct., S. Car., 1922) cited by FMC at page 15 of its brief is not applicable. The "accidental" concentration of carbofuran in the lagoon did not prevent FMC from taking effective measures to prevent the bird deaths. The Court correctly refused to charge the jury concerning accidental death and properly advised them that it made no difference whether or not the carbofuran was deliberately or accidentally pumped into the lagoon (369, 370).

IV. Conclusion

The imposition of the penalty under Section 707 of the Migratory Bird Treaty Act for the killing of migratory birds under Section 703 is the regulatory sanction for a statutorily prohibited act. Its imposition requires no finding of intent in the killing of migratory birds.

FMC had knowledge of bird deaths at its waste water holding lagoon throughout the period of the indictment and

specific knowledge that carbofuran caused those deaths for the last month of the indictment period. Nevertheless it failed to take action to prevent the bird deaths. The trial Court had no factual basis for granting its instruction concerning accidental death.

Respectfully submitted,

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AFFIDAVIT OF SERVICE BY MAIL

USA vs. FMC Corporation

No. 77-1372

State of New York)
County of Genesee) ss.:
City of Batavia)

I, Leslie R. Johnson being
duly sworn, say: I am over eighteen years of age
and an employee of the Batavia Times Publishing
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On the 15th day of November, 19 77
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Richard J. Arcara Esq., U. S. Attorney, 502 U. S.

Courthouse, Buffalo, NY 14202 Att: Kenneth A. Cohen Esq.
Asst. U. S. Attorney

Leslie R. Johnson

Sworn to before me this

15th day of Nov., 19 77

Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1979

